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ALLIANZ GENERAL INSURANCE MALAYSIA v. KL CHAN & ASSOCIATES

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
PRASAD SANDOSHAM ABRAHAM JCA
B MARY LIM JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-72-01-2015]
28 MARCH 2017

C ***INSURANCE:*** *Policy – Indemnity – Claims – Repudiation of policy – Whether insurance company wrongfully repudiated policy for non-disclosure of material facts – Whether disclosure had to be made once there was intimation or circumstances giving rise to a claim – Whether insured aware of potential claims at point of entering insurance contract – Whether insured complied with requirement of giving notice in writing of any claims made against him – Whether there was implied* D *permission given to insured to enter into settlement agreement with suing party – Whether insured entitled to be indemnified pursuant to terms of policy*

The respondent, a firm of consulting engineers, entered into a contract of insurance with the appellant, an insurance company, under a master policy number O1LMT000099 certificate number 000034 ('the policy'). The E period covered was from 1 January 2001 to 31 December 2001. It was a term of the policy that the respondent, as an insured, would be indemnified against any liability for losses arising from any claim for compensation including costs made against him, for any negligence by way of act, error or omission in the performance of his duties as an engineer, during the cover F period. The respondent was engaged as a structural consulting engineer in a housing project ('the project') which was developed by Aneka Seloka Sdn Bhd ('Aneka'). The project was completed in mid-1999 and a certificate of fitness was issued by the local authority in September 1999. Structural defects of the houses in the project were first reported by the residents in G April 2000. The respondent was eventually sued by Aneka in a civil action under the tort of negligence, for breach of professional services in relation to the project. The respondent forwarded the writ of summons and statement of claim to the appellant. The respondent claimed that pursuant to the policy, he was entitled to reimbursements for the expenses incurred in engaging his own solicitors to defend the suit by Aneka. However, the appellant H repudiated liability of the policy. Subsequently, the respondent and Aneka together with another party entered into a settlement agreement on the suit. Pursuant to the settlement agreement, the respondent was obligated to pay a sum of RM730,000 to Aneka. Further to that, the respondent had incurred costs in the form of, amongst others, legal fees. The respondent's claim I against the appellant was for the appellant to reimburse the amount paid out by the respondent which the respondent claimed he was entitled to be indemnified pursuant to the terms of the policy. The basis for the appellant

repudiating the policy was because the respondent had breached cl. 2.02(2) of the policy for failure to disclose material facts as envisaged by that clause, which was that the respondent already had information of the potential claim by Aneka against him at the point of him entering into the contract of insurance with the appellant. The respondent filed this claim before the High Court. The High Court Judge ('HCJ') allowed the respondent's claim and held that the appellant had wrongfully repudiated the policy. Dissatisfied with the said decision, the appellant appealed. The issue that arose for consideration was whether the HCJ had erred in deciding, *inter alia*, (i) that the policy was unlawfully repudiated by the appellant for non-disclosure of material facts; and (ii) that there was an implied permission given to the respondent to enter into a settlement agreement for the sum of RM730,000 with Aneka.

Held (allowing appeal)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) The requirement to disclose under the policy was not premised on the fact that a claim had been made but merely on the fact that there was an intimation of or notice of circumstances known to the insured as may lead to a potential claim against him. It was clear from its wordings that the disclosure under cl. 2.02(2) has to be made once there is such an intimation or circumstances which may give rise to a claim. There need not be a claim in place or had already been made, before the requirement of disclosure under cl. 2.02(2) kicks in. The HCJ had clearly fallen into error in construing the requirement of disclosure under this clause. Resulting from that failure, the HCJ had erred in holding that because there was no claim prior to February 2001, then there was no breach of cl. 2.02(2) on the part of the respondent. Further, the respondent had admitted that he was aware of the complaint of the structural defects and of the intimation of potential claims against him. The pure admissions made by the respondent that there was indeed a breach of cl. 2.02 was too obvious to be ignored. The HCJ could have easily found a breach of the policy by the respondent which entitled the appellant to rely on cl. 2.02(2) to repudiate the policy. (paras 23-25)

(2) As a condition precedent to the claim under the policy, the respondent ought to comply with the requirement of giving notice in writing of any claim made against him. The HCJ had made her finding that the respondent had indeed complied with this clause when he notified the appellant of the impending claim *vide* three letters dated 1 March 2001, 20 April 2001 and 7 August 2001, and therefore there was a proper claim made. In placing her whole reliance on the requirements of cl. 3, the HCJ had not appreciated the stand taken by the appellant on the requirement of disclosure under cl. 2.02(2) first. The issue on cl. 3 did not even arise when cl. 2.02(2) had been breached. The compliance of cl. 3 by the respondent did not *ipso facto* make his claim valid. The HCJ had not only failed to construe the relevant clauses of the policy

correctly but had failed to appreciate the requirement of a full and frank disclosure in an insurance contract. An insurance contract imposes a mutual duty on parties to it, to act *uberrimae fides* towards each other. (paras 28 & 29)

(3) The HCJ had fallen further into another error to find that there was no breach of the terms of the policy when the settlement agreement for the sum of RM730,000 was entered into by the respondent. The settlement agreement took place on 22 February 2011, after the appellant had already repudiated its liability under the policy on 21 May 2004. Prior to that, the appellant through the same letter of 28 March 2003 had stated that the appellant was in the midst of perusing and investigating its liability, but there was no mention of any advice or consent for a settlement of the claim. It could not be taken or construed as implied consent from its plain reading. (paras 30 & 33)

(4) The subject matter on the settlement of claim had been clearly addressed in the terms of the policy. Clause 1.02 of the policy required written consent of the appellant to enter into any settlement of a claim. In addition, cl. 3.02 prohibits any admission of liability on the part of the insured to settle any claim or incur any costs or expenses in relation to a claim without written consent from the appellant as the insurer. The decision of the trial HCJ was, therefore, a plainly wrong decision that called for appellate intervention. (para 34)

Bahasa Malaysia *Headnotes*

Responden, sebuah syarikat perunding jurutera, memasuki satu kontrak insurans dengan perayu, sebuah syarikat insurans, di bawah nombor polisi induk 01LMT000099 sijil nombor 000034 ('polisi'). Tempoh yang diliputi adalah dari tarikh 1 Januari 2001 hingga 31 Disember 2001. Adalah syarat polisi bahawa responden, sebagai yang diinsuranskan, dilindungi daripada menanggung rugi terhadap apa-apa liabiliti untuk kerugian dari mana-mana tuntutan ganti rugi termasuk kos terhadapnya, untuk apa-apa kecuaian melalui tindakan, kesalahan atau peninggalan dalam melakukan tugas-tugasnya sebagai jurutera, semasa tempoh tersebut. Responden ditugaskan sebagai perunding kejuruteraan struktur dalam satu projek perumahan ('projek') yang dibangunkan Aneka Seloka Sdn Bhd ('Aneka'). Projek diselesaikan pada pertengahan tahun 1999 dan satu sijil kelayakan jentera dikeluarkan oleh pihak berkuasa tempatan pada September 1999. Kecacatan struktur rumah-rumah dalam projek tersebut telah dilaporkan oleh penduduk pada April 2000. Responden akhirnya disaman oleh Aneka dalam guaman sivil bawah kecuaian tort, atas pelanggaran perkhidmatan profesional berhubungan dengan projek itu. Responden menyerahkan writ saman dan pernyataan tuntutan kepada perayu. Responden mendakwa bahawa menurut polisi, responden berhak mendapatkan pembayaran balik untuk perbelanjaannya dalam melantik peguamnya sendiri bagi membelanya dalam

guaman yang difailkan Aneka. Walau bagaimanapun, perayu menolak liabiliti terhadap polisi tersebut. Kemudiannya, responden dan Aneka bersama-sama dengan satu pihak lain memasuki perjanjian penyelesaian guaman tersebut. Menurut perjanjian penyelesaian, responden diwajibkan membayar jumlah RM730,000 pada Aneka. Responden juga telah menanggung kos dalam bentuk, antara lain, yuran guaman. Tuntutan responden terhadap perayu adalah untuk perayu membayar balik jumlah yang telah dibayar oleh responden yang responden mendakwa ia berhak untuk mendapatkan sebagai perlindungan menurut syarat-syarat polisi. Asas perayu menolak polisi tersebut adalah kerana responden telah melanggar kl. 2.02(2) polisi atas kegagalannya mendedahkan fakta material seperti yang diperuntukkan oleh klausa tersebut, iaitu bahawa responden sudah mempunyai maklumat berkenaan tuntutan berpotensi oleh Aneka terhadapnya pada masa responden memasuki kontrak insurans dengan perayu. Responden memfailkan tuntutan ini di hadapan Mahkamah Tinggi. Hakim Mahkamah Tinggi ('HMT') membenarkan tuntutan responden dan memutuskan bahawa perayu telah dengan salah menolak polisi tersebut. Tidak puas hati dengan keputusan tersebut, perayu merayu. Isu-isu yang dibangkitkan untuk pertimbangan adalah sama ada Mahkamah Tinggi terkhilaf dalam memutuskan, antara lain (i) bahawa polisi telah secara salah ditolak oleh perayu atas kegagalan mendedahkan fakta material; dan (ii) terdapat persetujuan tersirat yang diberi kepada responden untuk memasuki perjanjian penyelesaian dalam jumlah RM730,000 dengan Aneka.

Diputuskan (membenarkan rayuan)
Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Keperluan pendedahan bawah polisi tidak berdasarkan fakta bahawa tuntutan telah dibuat tetapi hanya atas fakta bahawa terdapat pemberitahuan atau notis keadaan yang diketahui oleh pihak yang diinsuranskan yang boleh membawa kepada tuntutan berpotensi terhadapnya. Jelas dari ungkapannya bahawa pendedahan bawah kl. 2.02(2) harus dibuat sebaik sahaja terdapat maklumat atau keadaan yang boleh membawa kepada satu tuntutan. Tidak perlu ada tuntutan dibuat ketika itu atau telah dibuat sebelum itu, sebelum keperluan pendedahan bawah kl. 2.02(2) berkuat kuasa. HMT telah terkhilaf dalam cara beliau mentafsirkan keperluan pendedahan bawah klausa tersebut. Akibat kegagalan itu, hakim telah terkhilaf dalam memutuskan bahawa kerana tiada tuntutan sebelum bulan Februari 2001, tiada pelanggaran kl. 2.02(2) dari pihak responden. Seterusnya, responden mengakui sedar terdapat aduan berkenaan kecacatan struktur dan maklumat berkenaan tuntutan berpotensi terhadapnya. Pengakuan-pengakuan yang dibuat oleh responden bahawa terdapat pelanggaran kl. 2.02 adalah terlalu jelas untuk diabaikan. HMT boleh dengan senangnya mendapati terdapat pelanggaran polisi oleh responden yang memberi hak kepada perayu untuk bergantung pada kl. 2.02(2) bagi menolak polisi.

(2) Sebagai syarat terdahulu terhadap tuntutan bawah polisi tersebut, responden harus memenuhi keperluan memberi notis bertulis berkenaan apa-apa tuntutan terhadapnya. Hakim Mahkamah Tinggi telah membuat dapatannya bahawa responden mematuhi klausa ini apabila responden memberikan notifikasi kepada perayu bahawa terdapat tuntutan yang akan berlaku melalui tiga surat bertarikh 1 Mac 2001, 20 April 2001 dan 7 Ogos 2001, dan oleh itu terdapat tuntutan yang betul dibuat. Dalam bergantung sepenuhnya pada keperluan kl. 3, hakim bicara tidak mempertimbangkan kedudukan yang diambil oleh perayu berkenaan keperluan pendedahan bawah kl. 2.02(2) terdahulu. Isu kl. 3 tidak timbul apabila kl. 2.02(2) dilanggar. Pematuhan kl. 3 oleh responden tidak *ipso facto* membuatkan tuntutannya sah. Hakim Mahkamah Tinggi tidak hanya gagal mentafsirkan klausa relevan polisi dengan betul tetapi gagal menghargai keperluan pendedahan penuh dan terus terang dalam satu kontrak insurans. Kontrak insurans mengenakan kewajipan bersama atas pihak-pihak terlibat untuk bertindak *uberrimae fides* terhadap satu sama lain.

(3) Hakim Mahkamah Tinggi juga terkhilaf apabila mendapati tiada pelanggaran syarat-syarat polisi apabila perjanjian penyelesaian untuk jumlah RM730,000 dimasuki oleh responden. Perjanjian penyelesaian tersebut berlaku pada 22 Februari 2011, selepas perayu menolak liabiliti bawah polisi pada 21 Mei 2004. Sebelum itu, perayu melalui surat bertarikh 28 Mac 2003 telah menyatakan bahawa perayu sedang dalam proses meneliti dan menyiasat liabilitinya, tetapi tidak memberikan apa-apa nasihat atau kebenaran menyelesaikan tuntutan. Ini tidak boleh diambil atau ditafsirkan sebagai kebenaran tersirat pembacaan biasa itu.

(4) Hal perkara penyelesaian tuntutan telah jelas ditangani dalam syarat-syarat polisi. Klausa 1.02 polisi memerlukan kebenaran bertulis perayu untuk memasuki mana-mana penyelesaian tuntutan. Tambahan, kl. 3.02 melarang mana-mana pengakuan liabiliti pihak yang diinsuranskan bagi menyelesaikan apa-apa tuntutan atau menanggung sebarang kos atau perbelanjaan berhubungan tuntutan tanpa apa-apa kebenaran bertulis daripada perayu sebagai penanggung insurans. Keputusan HMT, oleh itu, adalah keputusan yang jelas salah yang mewajarkan campur tangan rayuan.

Case(s) referred to:

AXA Affin General Insurance Bhd v. ALW Car Workshop Sdn Bhd [2017] 2 CLJ 163 CA ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Juara Serata Sdn Bhd v. Alpharich Sdn Bhd [2015] 9 CLJ 37 FC ***(refd)***

Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***

MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA ***(refd)***

Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd [2016] 8 CLJ 211 CA ***(refd)***
Tan Kang Hua v. Safety Insurance Co [1972] 1 LNS 149 FC ***(refd)***

For the appellant - Leslie Bala & Paul Ngooi; M/s Othman Hashim & Co
For the respondent - Awtar Kaur; M/s K L Choy & Co

[Editor's note: For the High Court judgment, please see K L Chan & Associates v. Allianz General Insurance Malaysia Berhad [2014] 1 LNS 450 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Rohana Yusuf JCA:

[1] This appeal emanates from the decision of the High Court at Pulau Pinang after a full trial, in relation to a claim made by the respondent pursuant to a professional indemnity insurance policy. Prior to this, on 30 April 2014, the learned High Court Judge had decided and ordered for the respondent's claim to be dismissed for the reason that it was barred by limitation pursuant to the Limitation Act 1953. The respondent then appealed against the said decision. It was allowed by this court on 2 October 2014 as it was found that the cause of action by the respondent in fact arose in or around 2011 and thereby, the claim of the respondent was still within time.

[2] The case was remitted back before the same High Court Judge to be decided on its merits in particular on the issue of whether the policy was lawfully repudiated. Thereafter, the learned High Court Judge found that the policy was unlawfully repudiated and proceeded to allow the claim of the respondent. The appeal by the appellant before us pertained to that decision.

[3] We have heard the appeal on 9 December 2015 and we have unanimously allowed the appeal of the appellant and set aside the order made by the learned High Court Judge. Our reasons for our decision are set out below.

[4] By way of background, the respondent is a firm of consulting engineers known as KL Chan & Associates. KL Chan & Associates is a partnership where one of the partners, Chan Kam Leong is a member of the Association of Consulting Engineers. The appellant is an insurance company providing amongst others, professional indemnity insurance to members of the Association of Consulting Engineers. The appellant was then known as Malaysian British Assurance Berhad which was later changed to Allianz General Insurance Berhad.

[5] The respondent entered into a contract of insurance with the appellant under a master policy number 01LMT000099 certificate number 000034 (the policy). The period covered was from 1 January 2001 to 31 December 2001. The proposal for the policy was made on 31 October 2000 as

evidenced in the proposal form. The certificate of insurance was issued on 23 February 2001. The limit of insurance payable was RM1,000,000. There was a deductible of RM50,000 for each and every claim under the policy.

[6] It is a term of the policy that the respondent as an insured, would be indemnified against any liability for losses arising from any claim for compensation including costs made against him, for any negligence by way of act, error or omission in the performance of his duties as an engineer, during the cover period.

[7] The respondent was engaged as a structural consulting engineer in a housing project (the project) in Ipoh, which was developed by Aneka Seloka Sdn Bhd. The project was completed in mid-1999 and certificate of fitness was issued by the local authority in September 1999. Structural defects of the houses in the project were first reported by the residents in April 2000 as stated in Dunning Thorthon Consultants (M) Sdn Bhd's report dated May 2002 (p. 432 of the appeal record, part B & C, vol 2(4)). It was in evidence that one of the complaint letters sent to the developer about the structural defects on 9 August 2000 was also copied to the respondent. It must be observed that Arup Jururunding Sdn Bhd, the consulting engineers appointed by the developer to investigate the damage to the houses had stated in its July 2001 report that "the houses were occupied when cracks in the structure were reported in April 2000" (see p. 292 of the appeal record, part B, vol 2(3)).

[8] On three respective dates of 1 March 2001, 20 April 2001 and 7 August 2001, the respondent gave official notices purportedly under cl. 3 of the policy, of a pending claim against him to the appellant. According to the respondent, the appellant was kept abreast by him of what was happening regarding the said claim.

[9] The respondent was eventually sued by Aneka Seloka Sdn Bhd in a civil action No: 22-4-2003 filed at Ipoh High Court on 11 March 2003 under the tort of negligence, for breach of professional services in relation to the project. The claim was for damages in the sum of RM1,589,984.90. The respondent forwarded the writ of summons and statement of claim to the appellant. Upon receiving the writ, the appellant's solicitors, Messrs Othman Hashim & Co had on 28 March 2003 wrote to the respondent informing the respondent to engage its own solicitors to defend the claim by Aneka Seloka Sdn Bhd.

[10] The respondent proceeded to engage his own solicitors to defend the action and the appellant kept silent while the claim against the respondent was proceeding. The respondent claimed that pursuant to the policy, he was entitled to reimbursements for the expenses incurred in engaging his own solicitors to defend the suit by Aneka Seloka Sdn Bhd against him. On 21 May 2004 however, after carrying out some investigations, the appellant through its solicitors repudiated liability of the policy (pp. 493 to 494 of the appeal record, part B & C, vol 2(4)).

[11] Later, on 23 June 2010 the respondent informed the appellant that the claim of Aneka Seloka Sdn Bhd would be amicably resolved between the parties. The appellant also did not respond and remained silent. On 22 February 2011, the respondent and Aneka Seloka Sdn Bhd together with another party entered into a settlement agreement on the Aneka Seloka's suit. The settlement agreement is as found at p. 503 of the appeal records (part B & C, vol 2(4)). Pursuant to the settlement agreement, the respondent was obligated to pay a sum of RM730,000 to Aneka Seloka Sdn Bhd. This payment of RM730,000 was after a deduction of the respondent's counterclaim of RM21,350.

[12] Further to that, the respondent had incurred costs in the form of legal fees of RM10,218 to Messrs Ooi & Associates and RM65,950 to Messrs Amin Tan & Co. There were also geotechnical expert fees of RM21,000 to USAINS Holding Sdn Bhd incurred in defending the civil action by Aneka Seloka Sdn Bhd. In all, a total of RM97,168 was incurred by the respondent. The respondent had to further incur legal fees of RM31,300 to KL Choy & Co to take up this legal suit against the appellant. The respondent's claim against the appellant is for the appellant to reimburse the amount paid out by the respondent which the respondent claimed he is entitled to be indemnified pursuant to the terms of the policy.

[13] The basis for the appellant repudiating the policy on 21 April 2004, was because the respondent had breached cl. 2.02(2) of the policy. Accordingly, the breach was for failure of the respondent to disclose material facts as envisaged by that clause. The material fact being that the respondent already had information of the potential claim by Aneka Seloka Sdn Bhd against him at the point of him entering into the contract of insurance with the appellant.

[14] The respondent then filed this claim before the High Court. The learned High Court Judge however allowed the claim of the respondent holding that the appellant had wrongfully repudiated the policy. In her grounds of judgment, the learned judge made a finding that there was no claim made against the respondent prior to February 2001 and that the respondent was only indicated of the possibility of claims by the developer sometime in February 2001 while the policy was still effective. As such, the respondent was not withholding any information at the time he entered into the insurance contract with the appellant. There was therefore no breach of the policy as contended, according to the learned judge.

[15] The learned judge further found that there was an implied consent from the appellant for the respondent to enter into the settlement agreement with Aneka Seloka Sdn Bhd on 22 February 2011. Her Ladyship's finding was premised on the appellant's letter of 28 March 2003. In that letter which was made through its solicitors, the respondent was told to defend the case instituted by Aneka Seloka Sdn Bhd against him, himself. On the basis of that letter, the learned judge found no breach on the part of the respondent in

settling the claim of Aneka Seloka *vide* the settlement agreement. As such, there was no basis for the appellant to repudiate the policy, rendering the repudiation wrongful.

[16] Having found that the policy was wrongfully repudiated, the learned High Court Judge then allowed the following items of claim made by the respondent:

(a) judgment for the sum of RM705,350;

(b) the sum of RM81,568 being expenses incurred;

(c) the sum of RM31,300 being expenses on legal suit against the insurance company;

(d) interest at 5% per annum from 16 December 2014 till full payment; and

(e) costs of RM35,000.

Grounds Of Appeal

[17] Before us, learned appellant's counsel raised several grounds of appeal listed under the following headings:

(i) the learned judge erred in deciding that the professional indemnity policy No. 01LMT00099 *vide* certificate No. 000034 was unlawfully repudiated by the appellant on 21 May 2004 for non-disclosure of material facts;

(ii) the learned judge erred in deciding that there was an implied permission given to the respondent to enter into a settlement agreement on 22 February 2011 for the sum of RM730,000 with the developer, Aneka Seloka Sdn Bhd; and

(iii) the learned judge erred in allowing the respondent's claim for the sum of RM705,350 whilst there is no evidence that such a payment was actually made to the developer, Aneka Seloka Sdn Bhd.

Our Decision

[18] The appellant's right to repudiate any claim is listed out in cl. 2.02 of the policy. The relevant cl. 2.02 deserves to be quoted to appreciate the full breadth of its meaning. Clause 2.02 is part of the exclusion clause of the policy, and it clearly states that:

> 2.02 The Company shall not indemnify the Insured for any claim:
>
> (1) …
>
> (2) Of which the Insured received any intimation or notice, or of circumstances known to the Insured as may give rise to a claim then before the inception of this Policy.
>
> (3) …

[19] It was the appellant's case that the respondent had breached cl. 2.02(2) by withholding information on the potential claim against him by the developer Aneka Seloka Sdn Bhd when he failed to disclose such information in the proposal form dated 23 February 2001. The appellant contended that by that time, the respondent would have at least become aware of the potential claim when he received a letter of complaint on 9 August 2000, copied to him.

[20] The learned High Court Judge had found that there was no claim made against the respondent prior to February 2001 and that the respondent was only aware of the claim when he notified the appellant *vide* letters of 1 March 2001, 20 April 2001 and 7 August 2001 pursuant to cl. 3.0 of the policy. We agreed with the learned appellant's counsel that this finding was erroneous both on the facts and on the law.

[21] To recapitulate, the main basis for the learned judge to allow the claim of the respondent was because Her Ladyship found that there was no claim against the respondent prior to February 2001 for the respondent to disclose to the appellant when he signed the proposal form on 31 October 2000. In dealing with the requirement of cl. 2.02(2), the learned High Court Judge in her grounds of judgment strangely found that there was no notice of any claim made against the respondent "before the inception date of the policy". The learned judge held that there was no evidence adduced by the respondent of any claim made prior to February 2001.

[22] We agreed with learned appellant's counsel that in holding so, the learned judge had erred and had misdirected herself on both the law and the facts for two main reasons. First, the learned trial judge totally missed the whole requirement of cl. 2.02(2) in relation to the need to disclose information on a potential claim. Secondly, the learned judge did not consider the evidence and admission of the respondent through the evidence of PW1, who had admitted that he was aware of the potential claim and had further admitted that he had failed to disclose the same.

[23] The requirement to disclose under the policy is not premised on the fact that a claim had been made but merely on the fact that there was an intimation of or notice of circumstances known to the insured as may lead to a potential claim against him. It is clear from its wordings that the disclosure under cl. 2.02(2) has to be made once there is such an intimation or circumstances which may give rise to a claim. The construction of this clause can be easily discerned from a plain reading of it. There need not be a claim in place or already been made, before the requirement of disclosure under cl. 2.02(2) kicks in. While we may agree with Her Ladyship that there was no claim made then, but that is not the requirement of disclosure under cl. 2.02(2). The learned judge had clearly fallen into error in the way she construed the requirement of disclosure under this clause. Resulting from

that failure, the learned judge had fallen into error in holding that because there was no claim prior to February 2001 then there was no breach of cl. 2.02(2) on the part of the respondent.

[24] It was also patently plain and clear in evidence that the problems relating to the houses in the project were first reported in April 2000. Even if it can be said that the respondent was not aware of it in April 2000 itself, then at least he would have become aware when some residents reported on the structural defects on 9 August 2000 and extended a copy of their complaints to him. On top and above this, the respondent through PW1 admitted in evidence, that he was indeed aware that there would be potential claims by the time he signed up the proposal form on 31 October 2000. In answer to a cross-examination question, the respondent admitted that he was aware of the complaint on the structural defect. Not only that he admitted of the intimation of the potential claim against him, he had even agreed and admitted that he was then obliged under the term of the policy to disclose such information to the appellant but, he did not.

[25] The learned trial judge failed to appreciate this evidence and failed to address these admissions by the respondent in her judgment. The pure admissions made by the respondent that there was indeed a breach of cl. 2.02 was too obvious to be ignored. On these admissions alone, the learned judge could have easily found a breach of the policy by the respondent which entitled the appellant to rely on cl. 2.02(2) to repudiate the policy.

[26] Learned counsel for the respondent did not address the requirement of cl. 2.02 in his submissions either orally or in his written submission. A futile attempt was made orally before us to the effect that the respondent was not aware of the claim nor was there any claim made against him at the material time. This submission by learned counsel contradicted the clear admission made by the respondent in his testimony. We therefore were not able to appreciate this line of submission advanced by learned counsel. We hasten to add that counsel firstly, should not contradict the case of his client and secondly should always endeavour to assist the court in the conduct of these proceedings, instead.

[27] The learned judge having failed to construe the requirement of disclosure under cl. 2.02(2), went on to fasten her decision by deliberating on the requirement of cl. 3.03 instead. Clause 3.03 of the said policy clearly stipulates the following terms:

> 3.03 As a condition precedent to their rights under this Policy the Insured shall give to the company immediate notice in writing of:
>
> (1) any claim made or notified against them; or
>
> (2) knowledge of circumstances which may give rise to a claim against them; or

(3) the receipt of notice from or information as to any intention by another party to claim against them; or

(4) the discovery of reasonable cause to suspect any dishonest, fraudulent (whether actual or constructive) or malicious act(s) or omission(s) of any of their past or present employees or fellow partners or co-directors, whether giving rise to a claim or not and shall in all cases upon request give to the Company such information including where necessary a signed declaration as it may reasonably require to investigate the circumstances and conduct the defence of a claim.

[28] As a condition precedent to the claim under the policy, the respondent ought to comply with the requirement of giving notice in writing of any claim made against him. The learned judge had made her finding that the respondent had indeed complied with this clause when he notified the appellant of the impending claim *vide* the three letters of 1 March 2001, 20 April 2001 and 7 August 2001 and therefore there was a proper claim made. We agreed with Her Ladyship's deliberation on cl. 3. In placing her whole reliance on the requirements of cl. 3, the trial judge had not appreciated the stand taken by the appellant on the requirement of disclosure under 2.02(2) first. The issue on cl. 3 did not even arise when cl. 2.02(2) had been breached. The compliance of cl. 3 by the respondent does not *ipso facto* made his claim valid.

[29] The learned judge had not only failed to construe the relevant clauses of the policy correctly but had failed to appreciate the requirement of a full and frank disclosure in an insurance contract. It is well settled that an insurance contract imposes a mutual duty on parties to it, to act *uberrimae fides* towards each other. This court had in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1 emphasised on that need. The insured must make a full and frank disclosure of all material facts within his knowledge and there is also a corresponding duty to act in utmost good faith on the part of the insurer. (see *AXA Affin General Insurance Bhd v. ALW Car Workshop Sdn Bhd* [2017] 2 CLJ 163, *Tan Kang Hua v. Safety Insurance Co* [1972] 1 LNS 149; [1973] 1 MLJ 6 (FC)),

[30] The appellant further submitted that the learned High Court Judge had further fallen into another error to find that there was no breach of the terms of the policy when the settlement agreement for the sum of RM730,000 was entered into by the respondent. The settlement agreement took place on 22 February 2011, after the appellant had already repudiated its liability under the policy on 21 May 2004. Prior to that, the appellant through the same letter of 28 March 2003 had stated that the appellant was in the midst of perusing and investigating its liability, and had advised the respondent to proceed with the proper and appropriate action. There is no mention of any advice or consent for a settlement of the claim, in the letter.

[31] The learned judge had misconstrued this letter as amounting to consent to settle the claim against the respondent. But even if the letter would in any way tantamount to an implied consent, the learned judge had fallen into error to find no breach of the terms by the respondent in entering into the settlement agreement. This is because the consent required under cl. 1.02 and 3.02 must be one in writing. Clauses 1.02 and 3.02 are clear and unambiguous that a written consent is required to embark on a settlement exercise.

[32] It is axiomatic that the duty of the court is to give effect to the bargain entered into between parties especially when the terms are spelled out in writing. When words are written in clear language there is very little that the court can do but to give effect to the plain meaning of the words (see *Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd* [2016] 8 CLJ 211, *Juara Serata Sdn Bhd v. Alpharich Sdn Bhd* [2015] 9 CLJ 37).

[33] We therefore could not appreciate the stand of the learned respondent's counsel that the letter of 28 March 2003 which requested the respondent to defend the case himself could be read to imply consent to a settlement. It was made, as it is clearly stated therein pending the appellant perusing through, on the aspect of its liability. It cannot be taken or construed as implied consent from its plain reading. In any event, the subject matter on the settlement of claim had been clearly addressed in the terms of the policy. Clauses 1.02 of the policy requires written consent of the appellant to enter into any settlement of a claim. In addition, cl. 3.02 prohibits any admission of liability on the part of the insured to settle any claim or incur any costs or expenses in relation to a claim without written consent from the appellant as the insurer.

[34] We are mindful of the long established principle that an appellate court would only intervene with the decision of a trial court in the rarest occasion. The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 had set the rule that, generally an appellate court will only interfere on finding of facts on a plainly wrong test. A plainly wrong decision can happen when a trial judge is guilty of failure to appreciate or to sufficiently appreciate evidence at trial. In the same way errors of law, a clear misunderstanding of relevant evidence too contributes to such a plainly wrong decision (see *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665). On the reasons that we had elucidated above, we are convinced that the decision of the learned trial judge was a plainly wrong decision that called for appellate intervention.

[35] In the result, we allowed the appeal of the appellant with costs and the decision of the learned judge was thereby set aside.